

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANT: City of Bozeman

OBJECTORS: City of Bozeman; Lyman Creek LLC

NOTICE OF INTENT TO APPEAR: City of Three Forks

**CASE 41H-0049-R-2021**

41H 140882-00

41H 140883-00

CLAIMANT: Lyman Creek LLC

OBJECTORS: City of Bozeman; Lyman Creek LLC

COUNTEROBJECTOR: City of Bozeman

**CASE 41H-0092-R-2021**

41H 115677-00

41H 179248-00

41H 179249-00

41H 179251-00

41H 179252-00

**~~41H 179253-00<sup>1</sup>~~**

**ORDER DENYING MOTIONS TO INTERVENE**

**I. INTRODUCTION**

Trout Unlimited (TU) filed motions to intervene in cases 41H-0049-R-2021 and 41H-0092-R-2021. Both cases involve claims for water from Lyman Creek north of Bozeman. The City of Bozeman claimed water rights at issue in case 41H-0049-R-2021,

<sup>1</sup> The caption in the Court's November 14, 2022 *Order Assuming Case, Order Extending Motions Deadline, and Order Updating Service List* erroneously included claim 41H 179253-00. That claim was removed from case 41H-0092-R-2021 through a July 22, 2021 *Order Reconsolidating Case by Removing Water Right Claim 41H 179253-00*. The caption is corrected to remove the claim.

and Lyman Creek, LLC, claimed water rights at issue in case 41H-0092-R-2021. The City of Bozeman objected to the rights claimed by Lyman Creek LLC, and Lyman Creek, LLC objected to the rights claimed by the City of Bozeman. The City of Three Forks filed a notice of intent to appear (NOIA) in case 41H-0049-R-2021.

Trout Unlimited seeks intervention of right under Rule 24(a), M. R. Civ. P., and permissive intervention under Rule 24(b), M. R. Civ. P. The City of Bozeman (Bozeman) opposes intervention. The City of Three Forks (Three Forks) does not oppose intervention but asks that TU be prohibited from propounding discovery or expanding the issues if intervention is granted. Lyman Creek, LLC supports intervention.

## II. ISSUES

1. Is TU entitled to intervention of right?
2. Is TU entitled to permissive intervention?

## III. APPLICABLE LAW

Intervention of right and permissive intervention are governed by Rule 24, M. R. Civ. P. Intervention of right must be granted if authorized by statute or if the movant claims an interest relating to the property or transaction which is the subject of the action and is so situated that disposal of the action may impair the movant's ability to protect their interest unless another party adequately represents that interest. Rule 24(a), M. R. Civ. P. "Rule 24 is designed to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *Clark Fork Coalition v. Montana Dep't of Env'tl. Quality*, 2007 MT 176, ¶ 10, 338 Mont. 205, 164 P.3d 902 (quoting *Gruman v. Hendrickson*, 416 N.W.2d 497, 500 (Minn. App. 1987)).

Rule 2(a), W.R.Adj.R. states the Montana Rules of Civil Procedure apply to the water court "[u]nless the context of these Rules requires otherwise...." Because water rights cases and conventional civil actions have procedural differences, this court has previously held that Rule 9(b), W.R.Adj.R. and Section 85-2-233, MCA "attach limits to intervention, including scope and timing, not found in Rule 24, M.R.Civ.P." *In re Erb*, Case 41B-208, 2016 Mont. Water LEXIS 2, \*14 (April 11, 2016). Participants in the adjudication process "receive earlier and more extensive notice than most civil litigants."

*In re Erb*, \*11. In addition to receiving broad notice before the beginning of a case, potentially interested parties are subject to strict statutory deadlines for filing objections and notices of intent to appear. § 85-2-233, MCA.

The gateway for participation in Water Court proceedings is the objection process. The opportunity to file an objection is preceded by issuance of a decree coupled with basin-wide and individual notice. § 85-2-233, MCA. Objections must be filed within the time limits set forth in Rule 5(c), W.R.Adj.R. and Section 85-2-233(2), MCA, and the Water Court may not extend objection deadlines once they have passed.

Interested parties have a second opportunity for participation under Rule 9(b), W.R.Adj.R. This option allows for filing an NOIA after the objection list for a decree has been published. As with the issuance of the decree itself, the Water Court provides notice of the objection list and informs interested parties of the opportunity to file an NOIA. Rule 9(a), W.R.Adj.R.

There are important policy reasons for providing interested parties with ample notice of pending water litigation and for holding them to strict deadlines for participation.

This policy is driven by the legislature's oft repeated command to expedite the adjudication process. Among the duties of the Chief Water Judge is the obligation to assure the adjudication process is administered efficiently. § 3-7-223, MCA. The statute imposing this obligation requires that information be "expeditiously" transferred to water judges; that water judges move "without unreasonable delay," and "that any contested or conflicting claims are tried and adjudicated as expeditiously as possible." § 3-7-223(1)(a)-(c). MCA.

*In re Erb*, \*10

#### IV. ANALYSIS

##### 1. *Is TU entitled to intervention of right in case 41H-49?*

Determining whether intervention is proper under Rule 24(a), M. R. Civ. P. requires review of four questions:

- 1.) Was the motion for intervention timely?
- 2.) Did the movant show an interest in the subject matter of the action?

- 3.) Is the movant situated so that disposing of the action may impair their interest?
- 4.) Do existing parties adequately represent the movant's interest?

### ***Timeliness***

Analysis begins with review of the timeliness of TU's motion. Whether a motion is timely depends on how long the movant knew or should have known of its interest in the case before moving to intervene; prejudice to other parties resulting from the intervenor's delay in seeking intervention; prejudice to the intervenor if intervention is denied; and any unusual circumstances mitigating for or against a determination that intervention is timely. "None of these factors are, by themselves, dispositive." *In re C.C.L.B.*, 2001 MT 66, ¶ 24, 305 Mont. 22, 22 P.3d 646.

#### ***How Long Was TU Aware of its Interests in These Cases Before Moving to Intervene?***

TU seeks to protect its leases of water for instream flows and instream flow reservations held by the Montana Department of Fish Wildlife and Parks. TU's motion to intervene is based on its concern over application of the growing cities doctrine to Bozeman's water rights and its concerns over unlawful future expansion of those rights. The growing cities doctrine was codified by the legislature in 2005 and affords cities unique defenses against abandonment of their water rights. § 85-2-227(4), MCA. Montana courts have applied the doctrine in several cases. *See, e.g., City of Helena v. Cmty. Of Rimini*, 2017 MT 145, 388 Mont. 1, 397 P.3d 1; *United States (Dep't of Army Corps of Eng'rs) v. United States (Dep't of Army Corps of Eng'rs)*, 2019 MT 174, 396 Mont. 433, 445 P.3d 838.

TU has been a participant in matters relating to Bozeman's use of Lyman Creek water for years. Among these efforts, an attorney for TU served as a member of the Technical Advisory Committee that issued recommendations to the Bozeman City Commission regarding Bozeman's Integrated Water Resource Plan. One recommendation made by the Committee urged Bozeman to conduct a "feasibility study to determine how it can optimize water production from the Lyman Creek source. The city holds a much larger water right there than it is currently able to use." *City of*

*Bozeman's Combined Brief in Opposition to Trout Unlimited's Motions to Intervene*, Ex. 1 (Integrated Water Resources Plan at 4) (Oct. 27, 2022).

Bozeman added the Technical Advisory Committee recommendations to its Integrated Water Resource Plan, which was adopted in 2013. In 2017, a TU attorney wrote a letter to Bozeman's Public Works Director about the City's plans to update its water intake on Lyman Creek. The letter stated:

The City's proposal appears to expand the amount it diverts into the Lyman Creek system, which raises factual and legal questions about the extent of its water rights claims, not the least of which is whether the expansion causes adverse effects to downstream water users and the fishery.

*City of Bozeman's Combined Brief in Opposition to Trout Unlimited's Motions to Intervene*, Ex. 3 (Letter from Patrick Byorth to City of Bozeman Public Works Director at 1) (Oct. 27, 2022).

On October 11, 2018, the Water Court issued the Preliminary Decree for the Gallatin River Basin, which encompassed both Bridger and Lyman Creeks. The objection period was initially set to end April 9, 2019 and was later extended to May 9, 2019. Approximately 2,666 objections were filed, including objections by both Bozeman and Lyman Creek, LLC. TU did not file objections to either Bozeman's or Lyman Creek, LLC's water rights.

As required by statute, the Water Court subsequently published an objection list and notified the public of its opportunity to file NOIAs on any right receiving an objection. Lyman Creek, LLC's objections to Bozeman's water rights included the following statement: "The City never diverted the volume claimed at the historical point of diversion and/or it has abandoned a portion of the volume claimed." Lyman Creek, LLC objections to Bozeman claims 41H 140882-00 and 41H 140883-00 (May 8, 2019).

Lyman Creek, LLC's objection placed TU on notice of an abandonment issue and made it probable Bozeman would raise the growing cities doctrine as a defense. Despite this clear signal, and despite the concerns expressed in its 2017 letter, TU did not file NOIAs on Bozeman's Lyman Creek water rights.

Bozeman's water rights were consolidated into case 41H-0049-R-2021 on June 1, 2021 and Lyman Creek, LLC's water rights were consolidated into case 41H-0092-R-2021 on May 10, 2021. Discovery in both cases is now substantially closed and the deadline for filing pretrial motions has passed.

TU candidly admits it does not know whether Bozeman intends to use the growing cities doctrine to expand use of its water rights beyond historical levels. "The record of filings in this case does not indicate the extent to which Bozeman may attempt to expand its historical municipal water supply of surface water from Lyman Creek...." *Brief in Support of Motion to Intervene*, 7 (Oct. 14, 2022). Instead, the impetus behind TU's decision to intervene appears to be concerns over remarks made by counsel for the City of Bozeman at a Water Law CLE in October 2022.

Notwithstanding those concerns, the record shows TU was familiar with water use by the City of Bozeman on Lyman Creek years before the Preliminary Decree was issued in the Gallatin River Basin. TU participated in the planning process for Bozeman's use of water since 2012, collected years of hydrologic and fisheries data on Lyman Creek, and participated in litigation over Lyman Creek water in district court as recently as 2019. TU characterized its efforts to "ensure municipal compliance with Montana water law" as "long-standing" and stated it has "long defended its public interest" in FWP's instream flow reservations in Bridger Creek and the East Gallatin River. *Id.* at 1, 2. Despite these longstanding interests, TU did not file an objection to Bozeman's Lyman Creek rights and missed the opportunity to file NOIAs.

Looking at the evidence in a light most favorable to the movant, TU knew of its interest in Lyman Creek water usage by the City of Bozeman since at least 2017, and likely earlier. Notwithstanding this knowledge, TU waited years to act. In comparison, the City of Three Forks, which does not have the same historical involvement with Lyman Creek as TU, filed an NOIA and has been an active participant in these cases since their inception. TU has not offered a reasonable explanation for its failure to file objections or NOIAs, or for its delay in seeking intervention.

### Prejudice to Other Parties

TU seeks intervention so it can participate in making a record in both cases. Given TU's longstanding involvement in Lyman Creek, making a record presumably includes calling witnesses, introducing exhibits, and addressing issues important to TU that may not have been raised earlier by other parties. The question is whether TU's delay in seeking intervention will prejudice other parties. "The prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he or she knew or reasonably should have known about his or her interest in the action." *In re C.C.L.B.*, ¶ 30.

Discovery has closed except for some expert witness depositions, and the deadline for filing pretrial motions has passed. Unless TU limits itself to cross examining witnesses called by other parties, its participation in these cases will require that discovery be reopened and the pretrial motions deadline extended. In practical terms, this means restarting these cases near their beginning. Winding back the clock would impose additional costs on current litigants by requiring them to propound fresh discovery, take additional depositions, review additional evidence and exhibits, and blend all this new information into a revised litigation strategy. These impacts could have been avoided if TU filed timely objections or NOIAs.

TU's failure to file objections creates additional prejudice by depriving other parties of the right to file counterobjections. Counterobjections, which are authorized by Rule 6, W.R.Adj.R. and by Section 85-2-233(3), MCA, are an important tool for claimants whose water rights have been challenged. TU's decision to seek intervention after closure of the objection process circumvented the counterobjection process and deprived Bozeman and Lyman Creek, LLC of their statutory right to challenge TU's water rights. Loss of the right to counterobject constitutes an additional hardship for existing parties and could have been avoided if TU had timely filed objections.

Prejudice to the Intervenor

“A mere claim of interest is insufficient to support intervention as of right under Rule 24(a) (2), M.R.Civ.P. A district court must determine whether the party seeking intervention has made a prima facie showing of a “direct, substantial, legally protectable interest in the proceedings.”” *Sportsmen for I-143 v. Montana Fifteenth Judicial Dist. Court*, 2002 MT 18, ¶ 9, 308 Mont. 189, 40 P.3d 400 (quoting *DeVoe v. State*, 281 Mont. 356, 363, 935 P.2d 256, 260 (1997)).

TU claims it has several interests that may be compromised if intervention is denied, including a desire to protect instream flow reservations held by the Montana Department of Fish Wildlife and Parks. The Montana Department of Fish Wildlife and Parks is not a party to these proceedings, and TU does not explain why it is best situated to protect the State’s interests, why the State elected not to file its own objections to Bozeman’s water rights, or how the State’s instream flow reservations might be adversely impacted if TU’s request for intervention is denied.

Similar analysis applies to TU’s assertion that it needs to defend water rights held by Lyman Creek, LLC. Lyman Creek, LLC is already a party to both actions and appears fully capable of protecting its own water rights as well as challenging those held by Bozeman. TU will not be prejudiced if it is precluded from advocating for Lyman Creek, LLC.

TU also asserts it leases 13 instream flow rights in the Gallatin River Basin but provides little information on the location of those leases or the stream reaches they protect. Some of these leases are on tributaries of Bridger Creek upstream of Lyman Creek. TU has not shown how these upstream leases will be impacted by Bozeman’s exercise of its downstream Lyman Creek water rights. Additionally, TU has not provided any information on the location of its remaining instream flow leases. Without that information, it is speculative to conclude TU will suffer prejudice if intervention is denied.

TU’s non-specific reference to ownership of two water rights in the Gallatin River Basin creates the same problem. TU supplied no information about the location of its



water rights, their connection to Lyman Creek, or whether they are senior or junior to Bozeman's rights and therefore susceptible to impact from Bozeman's use of Lyman Creek water. Non-specific references to ownership of water rights does not provide the context needed to determine if TU's water rights constitute "direct, substantial, and legally protectable interests" warranting intervention.

TU has the burden of showing its interests could be impacted if intervention is denied. That burden requires TU to produce sufficient information to make its interest in these proceedings clear. TU did not meet that burden. Even assuming TU had shown interests warranting intervention, the question it failed to answer was why it waited several years after the objection deadline to protect those interests. TU had the knowledge and opportunity to act. Any prejudice it may suffer now is a consequence of its inaction.

*Other Factors Impacting a Determination of Timeliness*

Completion of the adjudication process for the benefit of all water users depends on diligent participation by interested parties.

The Montana Water Use Act anticipates that there will be disagreements over the use of water among varying interests and "the integrity of Montana's adjudication process depends upon the assertion and ultimate resolution of these varying interests. The provisions of the Act charge all water users with the duty of asserting and defending their interests." *Bean Lake II*, 240 Mont. at 42, 782 P.2d at 900. This Court has recognized the importance of an adjudication process to firmly establish existing water rights and the necessity of "comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims." *Adjudication of Rights in the Yellowstone River*, 253 Mont. at 179-80, 832 P.2d at 1217.

*Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 42, 361 Mont. 77, 255 P.3d 179.

A crucial component of participation in the adjudication is timeliness. Late motions to intervene, late motions to amend, and untimely certification of water rights from a district court to the Water Court delay the adjudication and postpone issuance of

final decrees. Accordingly, each water user has an obligation to protect their interests by filing timely objections.

TU's attempt to intervene in the present cases is not the first time it has asked to participate in litigation over the growing cities doctrine without filing a timely objection or NOIA. TU filed a petition for a writ of supervisory control with the Montana Supreme Court earlier this year seeking review of an order in a case involving the City of Belgrade. The Supreme Court rejected TU's effort noting "TU has never attempted to object, appear, or otherwise participate in any of these cases before the Water Court and should not be permitted to circumvent the ordinary Water Court process." 2022 Mont. LEXIS 676, \*4 (July 19, 2022). The Supreme Court further noted, "TU does not claim that it could not have filed an objection or a notice of intent to appear in the Belgrade case or could not do so in other municipal water rights proceedings." *Id.* at \*5.

The receipt of notice at the start of water rights litigation places water users in a different position than intervenors in conventional civil litigation who may or may not be aware of threats to their property interests when a lawsuit begins. Every water user has an opportunity to object to each claim in a decree. Those opportunities occur at the beginning of the process and are designed to encourage early participation and an orderly, predictable process leading to a final decree. Broad notice and early opportunities to object, together with "the many factors weighing against late expansion of a water rights case" place "a heavy burden" on a party seeking to raise new issues after statutory deadlines for filing objections and notices of intent to appear have lapsed. *In re Erb*, \*23.

Granting intervention to a party that has known of its interests for years and declined to protect those interests by filing timely objections sends the wrong message to other litigants, who will conclude intervention has advantages over a timely objection. If intervention enables parties to avoid counterobjections and allows them to assess a case someone else has developed, then intervention will become preferable to filing an objection. That is why the Water Court places a heavy burden on those seeking to participate in the adjudication after statutory deadlines for doing so have passed.

## V. CONCLUSION AND ORDER

Timeliness is a threshold issue in determining whether intervention sought as a matter of right under Rule 24(a) or by permission under Rule 24(b) is warranted. *In re C.C.L.B.*, ¶ 22. TU's motion to intervene was not timely. Rule 24 is designed to “protect nonparties from having their interests adversely affected by litigation conducted without their participation.” *Clark Fork Coalition*, ¶ 10 (quoting *Gruman v. Hendrickson*, 416 N.W.2d 497, 500 (Minn. App. 1987)). TU could have avoided adverse impacts to its interests by filing a timely objection. Accordingly, TU's motion for intervention is denied.

### ELECTRONICALLY SIGNED AND DATED BELOW.

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